

AGENDA FOR TEXCOM MEETING
TRUST AND ESTATES SECTION, STATE BAR OF CALIFORNIA
SATURDAY, FEBRUARY 7, 2009, 9:30 A.M. – 3:30 P.M.
LAX HILTON

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"There's no need for your kitty to be envious. After state and federal taxes and legal and administrative fees, Chessy's share of Aunt Martha's estate came to hardly anything."

**I. WELCOME, REPORTS OF CHAIR AND SECTION ADMINISTRATOR
(15-20 Minutes)**

- | | | |
|----|---|--------|
| A. | Welcome | TONG |
| B. | Approval of Minutes of January 10, 2009, Meeting | TONG |
| C. | Report of the Chair | TONG |
| | 1. Invitation to join COPRAC | |
| | 2. Retreat topics, L'Auberge del Mar | |
| D. | Report of the Vice Chair | HORTON |
| | 1. Finance Report | |
| | 2. 2010 Retreat - Claremont Hotel & Spa | |
| E. | Report of the Section Liaison | ORLOFF |
| F. | Report from the Council of State Bar Sections | STERN |
| G. | Report from the Chair of the Nominating Committee | STERN |

**II. LEGISLATION REPORT AND DISCUSSION - CHAIR COREY/EHRMAN
(20 minutes)**

- A. REVIEW OF LEGISLATION
1. 2009 T&E Proposals approved by the BOG BERCOVITCH/WADA
 - a) *T&E 2009-08 (Collection of Personal Property in Estate by Sister State Personal Representation without Ancillary Administration)*
 - b) *T&E 2009-09 (Trustee's Duty to Inform Beneficiaries: Clarification and Expansion)*
 - c) *T&E 2009-10 (Trustee Notification)*
- B. Approved Projects
1. T&E 2010-1 (Probate Code section 1470 - Appointment of Counsel)
 2. T&E 2010-2 (Change to Statutory Will form)
 3. T&E 2010-3 (Increases to Summary Proceeding limits)
- C. Review of bills from the 2009-2010 Legislative Session
1. AB76 - Yamada - Life and Annuity Consumer Protection Fund - Lodise
 2. AB103 - DeLeon - Change in Ownership - Pharies
 3. AB129 - Ma - Taxpayer communications - Jaech
 4. AB152 - Carter - Older Americans Act (disability def) - Lodise
 5. AB157 - Anderson - Transferring Base Year - Pharies
 6. ABX3 - Jones - Medical - Lodise/Stern

7. SB20 – Simitian – Personal Information Privacy - Reggiardo
8. SB40 – Correa – Personal Information –Social Security Nos. – Reggiardo
9. SB56 – Alquist – Health Care Universal Coverage – Stern/Lodise
10. SB92 – Aanestead – Health Care Reform – Stern/Lodise
11. SB105 – Harmon – Donative Transfers (Horton et al)
12. SB114 – Medical Foster care – Lodise/Stern

COMMITTEE REPORTS

III. NCCUSL - Chair NANCY HOWARD (5 minutes)

- | | |
|-----------------------------|--------|
| A. Uniform Guardianship Law | STERN |
| B. Changes to UPIA | HOWARD |

IV. ETHICS - Chair MEG LODISE (2 Minutes)

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| A. Inaugural Report | LODISE |
| B. ABA 1.14 & RULES Revision Commission | LODISE |

V. INCAPACITY – Chair MEG LODISE (10 minutes)

- | | |
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| A. Professional Fiduciaries Bureau – developments | MATULICH |
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VI. CONFERENCE OF DELEGATES – Chair MARC SALLUS (15 minutes)

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| A. Site dispute affecting Conference and Annual Meeting | |
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VII. EDUCATING SENIORS – Chair MARC SALLUS (20 minutes)

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| A. Use of AMA Funds | SALLUS |
| B. Speakers Bureau Reorganization & Training | SALLUS |
| C. Wills for Heroes | SALLUS |

VIII. ESTATE PLANNING – Chair SIL REGGIARDO (25 minutes)

- | | |
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| A. Statutory Power of Attorney | HOWARD |
| Probate Code 4462-4464 - legislative fix | |
| B. Trust formalities | REGGIARDO |

IX. TECHNOLOGY – Chair DAVID GAW (10 minutes)

- | | | |
|----|--------------------------------|------------------|
| A. | E-News | GAW |
| B. | Workroom issues | HENDEN |
| C. | Members webpage content review | HENDEN/REGGIARDO |

X. EDUCATION – Chair BART SCHENONE (10 minutes)

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|----|---|----------|
| A. | Programs for San Diego Annual Meeting | SCHENONE |
| B. | Report on the SEI – January 16-18, 2009 | SCHENONE |
| C. | Stand Alone Programs | SCHENONE |
| | 1. Sophisticated Estate Planning – April 17, 2009 | |
| | 2. The Legal Specialization Exam and You– June 26, 2009 | |
| D. | Your Legal Rights | SCHROFF |
| | 1. Upcoming Programs for 2009 | |

**XI. CONSERVATORSHIP WORKING GROUP – Chair ED COREY
(NR)**

**XII. TRUST AND ESTATE ADMINISTRATION – Chair MARGARET HAND
(25 minutes)**

- | | | |
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| A. | Section 16350 Hasso v. Hasso project | SCHENONE |
| B. | Section 15403 & 15404 trust modification project | HAND |

XIII. EADE – Co-chairs JOHN HARTOG and NEIL HORTON (10 minutes)

XIV. CLRC – Chair DAVID BAER (10 minutes)

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| A. | Care Custodian Project (Section 21350) | HORTON |
| B. | Attorney Client Privilege after Death | |
| C. | Clean up of No Contest Clause | |

XV. LITIGATION – Chair DAVID BAER (15 minutes)

- | | | |
|----|---|---------|
| A. | New project: Evidentiary hearings for probate proceedings | BAER |
| B. | Probate Code section 15804 (Virtual Representation) | BAER |
| C. | Mediation in probate proceedings | EPSTEIN |

XVI. MEMBERSHIP AND MARKETING – Chair BECKY SCHROFF

(5 minutes)

- A. Membership Count**
- B. Clean up of out of date online courses**

XVII. INCOME AND TRANSFER TAX – Chair JEFF JAECH (5 minutes)

- A. Eagle Lodge West project on trust income tax HAYES**

XVIII. QUARTERLY – Executive Director: PHIL HAYES; Editor: ANDY ZABRONSKY (2 minutes)

- A. Winter issue**
- B. Spring issue deadlines**
 - 1. Manuscripts – February 1, 2009**
 - 2. Alerts – March 1, 2009**

XIX. NEW BUSINESS

- A. Probate fees**

XX. UPCOMING ATTRACTIONS

- A. SPEAKERS' BUREAU TRAINING – March 4, 2009, SF STATE BAR OFFICES**
- B. NOMINATING COMMITTEE MEETING – March 13, 2009, Law Offices of the Legacy Law Group 180 Promenade Circle, Ste 120, Sacramento (Note new address)**
- C. TEXCOM MEETING – March 14, 2009, 10:30 am – 4:00 pm, DOWNEY BRAND, 621 Capitol Mall, 18th Floor, Sacramento (Note new address and time)**

Executive Committee
Trusts and Estates Section
State Bar of California
San Francisco, California
January 10, 2009

Members Present: May Lee Tong (Chair), Neil F. Horton (Vice-Chair), David W. Baer, Jeremy B. Crickard, Richard L. Ehrman, Bette B. Epstein, Michael Gerson, Nancy E. Howard, Patrick Kohlmann, Jayne C. Lee, Barry K. Matulich, Andrew Pharies, Marc Richards, Marc L. Sallus, Bart J. Schenone, and Rebecca L. Schroff.

Members Absent: Shannon Burns.

Advisors Present: James J. Brown, Jr., Edward J. Corey, Jr., David B. Gaw, John A. Hartog, Kay E. Henden, Charlotte K. Ito, Jeffrey A. Jaech, Margaret G. Lodise, Tracy M. Potts, Silvio Reggiardo III, and Peter S. Stern.

Advisors Absent: Thomas E. Beltran, Margaret M. Hand, Philip J. Hayes, Adam F. Streisand, and Andrew Zabronsky.

Others Present: Don E. Green (Judicial Liaison), Saul Bercovitch (Legislative Counsel), Jennifer Wada (Legislative Advocate, reporting by telephone), Mary Pat Toups (Seniors Program, Legal Aide Society of Orange County), Suzanne Goode (CEB), Leonard W. Pollard II (Reporter), and Susan Orloff (Section Administrator).

I. WELCOME, REPORTS OF CHAIR/VICE CHAIR AND ADMINISTRATOR

A. Welcome

TONG

Chair Tong welcomes TEXCOM to her second meeting. She introduces visitor Mary Pat Toups, who will address TEXCOM on transfer on death deeds, which TEXCOM references as "AB 250."

B. Approval of Minutes of November 15, 2008 Meeting

TONG

Mr. Crickard adds language at page 15, under "Statutory Will-Clean Up Proposal," to insert after the TEXCOM approval action, that: "Mr. Hartog makes a related motion to revise the form of California Statutory Will at section 6, adding language (underlined) regarding Guardian of the Child's Person as follows: "If I have a child under age 18 at my death and the child" TEXCOM also approves Mr. Hartog's motion." Otherwise, TEXCOM unanimously approves the Minutes.

C. Report of the Chair

TONG

Chair Tong encourages Committee Chairs to calendar their meetings in our Workroom.

D. Report of the Vice Chair

HORTON

1. Finance Report

A one-page handout is a Trusts and Estates Section, Financial Summary for Period Ending November 30, 2008, referencing current revenues and expenditures, and the 2007 Carry Forward, which is \$419,669. Mr. Horton says we are paying our own way, without dipping into reserves. Accordingly, the pressure remains on the Education Committee Chair to continue our profitable educational programs. Ms Orloff notes that the State Bar Assessment was charged in December 2008, which is not referenced in the financial summary that ends in November 2008.

E. Report of the Section Liaison

ORLOFF

Ms. Orloff reminds TEXCOM to submit an expense report for this meeting by February 10, 2009. Then she comments regarding the Westin Hotel, where our meeting is being held: (1) She instructs on the three-step process necessary to obtain validated parking, and (2) Obviously delighted, she says the Westin provides a very inexpensive ("close to free") wireless internet connection. That is, most hotels charge \$150 per wireless internet connection, but the Westin only charges \$15 per line. And she invites TEXCOM to log on with their laptops.

F. Report from the Council of State Bar Sections

STERN

Mr. Stern reports that the Council of State Bar Sections had its last meeting in September 2008 (as reported in the November 2008 Minutes at page 2), and its next meeting is not scheduled.

G. Report from the Chair of the Nominating Committee

STERN

Mr. Stern calmly says we have received one application for 2010 TEXCOM membership, with such applications facing a February 2, 2009, submission deadline. He encourages TEXCOM to encourage hard working potential applicants to apply for membership. Ideally, we would be recruiting primarily from District 1 [far north, being Roseville to the Oregon border], District 4 [San Francisco and Marin County], and District 5 [a slice in the State from Monterey to Nevada, passing through Fresno]. As previously noted, if we encourage capable attorneys to apply, we should note there is no assurance of obtaining membership. Our objective is to have a pool of capable applicants from whom five new TEXCOM members would be selected.

The Nominating Committee consists of TEXCOM officers and sitting former Chairs, as well as the Class of 2003, who will be graduating Advisors this year. The Nominating Committee will meet at Ms. Potts offices in Sacramento the afternoon before the March 2009 meeting.

II. LEGISLATION REPORT AND DISCUSSION – CHAIR COREY/EHRMAN

A. REVIEW OF LEGISLATION

- 1. 2009 T&E Proposals approved by the BOG BERCOVITCH**
 - a) T&E 2009-08 (Collection of Personal Property in Estate by Sister State Personal Representation without Ancillary Administration)**
 - b) T&E 2009-09 (Trustee's Duty to Inform Beneficiaries: Clarification and Expansion)**
 - c) T&E 2009-10 (Trustee Notification)**

Legislative Advocate Jennifer Wada calls in to report on her search for Legislative authors for our 2009 T&E proposals approved by the BOG:

- (i) T&E 2009-08 is being discussed with Assemblyman Lieu from Southern California.
- (ii) T&E 2009-09 and 2009-10 are both being considered by Assemblywoman Fiona Ma. Ms. Wada is meeting with her on Tuesday.

Due to the budget crisis in California, the Senate is limiting its members to introducing 15 bills. The Assembly has not placed a bill limit on its members, as yet, but is pressuring its members to reduce the number of bills introduced. In that vein, Chair Tong notes Assemblywoman Ma is thinking about combining T&E 2009-09 and T&E 2009-10 in one bill. Ms. Wada adds that Assemblywoman Ma is concerned about possible opposition to one proposal, and Ms. Wada is already conferring with representatives of possible opposition to deal with their concerns.

Legislative Counsel has set January 30, 2009, as the submission deadline for its drafting bills.

B. Approved Projects

- 1. T&E 2009-1 (Probate Code section 1470 – Appointment of Counsel)**

Mr. Corey says he expects to soon receive the final statutory language for this proposal regarding Probate Code section 1470.

- 2. T&E 2009-2 (Change to Statutory Will form)**

Mr. Crickard will be sending in the final language for this statutory will proposal shortly. In a correction, Mr. Corey notes that the proposal numbers should actually reference “2010,” not “2009.” Mr. Corey notes that Mr. Bercovitch sometimes changes our final language after he reviews it. And Mr. Corey will put the proposals in our Workroom.

Referencing the Workroom, Chair Tong says she previously asked Committee Chairs to designate people to work with Mr. Corey regarding the Workroom. Now she suggests that Committee Vice-Chairs be appointed to fill that designation. The initial objective is to conduct a Workroom cleanup. Mr. Corey then asks the newly designated Vice-Chairs, before contacting

him, to review the Workroom and consider what to delete and what to keep, and then contact Mr. Corey.

**C. PRESENTATION BY MARY PAT TOUPS
AB 250 (Transfer on Death Deeds)**

Ms. Toups thanks TEXCOM for allowing her to attend this meeting and for all the work that TEXCOM does for its Section members. Ms. Toups says she is a part-time volunteer attorney working in the Seniors Program of the Legal Aide Society of Orange County. Of interest, Ms. Toups says that the Older Americans Act was passed in 1935, and it provided that all those over 65 years of age would receive free lawyers. But Congress has not provided very much related funding.

Ms. Toups continues. Many seniors who come to her are poor and in trouble. But the bulk of those who come to her are the “great middle class” who still do not have sufficient funds to hire attorneys for estate planning purposes. She is here to talk about her pet project, adopting statutory provisions for a revocable grant deed or “transfer on death” (“TOD”) deed to allow people to transfer property to others without attorneys.

Ms. Toups emphasizes that most people who come to see her cannot afford an attorney to draft a trust for them. But those who do come in with trusts, which typically reference all their assets in the trust as going to specified beneficiaries, say they have now changed their minds. And sometimes those persons say they have not put anything into their trust. Ms. Toups tells them that the unfunded trust will simply result in a probate, with the probate distribution being to the trust. In other words, the people cannot avoid the beneficiaries set forth in their trust simply by not funding the trust. Ms. Toups seeks a simple, revisable instrument to transfer property.

Ms. Toups brings several documents as possible handouts, which espouse the TOD deed, but are written by non-California attorneys. She references one article which echoes her comments that many elders cannot afford lawyers. It also estimates that only one legal aide attorney is available for every 8,000 eligible seniors.

Ms. Toups observes that several states have authorized revocable TOD deeds. Six years ago she started working on a project to enact statutes authorizing the TOD deed in California. But she knew the trusts and estates lawyers would not like it. Nevertheless, she asserts that California needs the revocable TOD deed. Ms. Toups has worked with the American Bar Association (“ABA”) Senior Lawyers and also the National Conference of Commissioners for Uniform State Laws (“NCCUSL”) lawyers, who she refers to as the “model code lawyers,” seeking to adopt a model revocable TOD deed. However, those attorneys have insisted on waiting and watching to see what California did.

A year ago, NCCUSL appointed a committee regarding the TOD deed. And recently, Nat Sterling retired from CLRC and was appointed to NCCUSL. He is drafting language for the revocable TOD deed. After the drafting work is completed, the draft language will be sent out to the states for comments, and then to the House of Delegates. Ms. Toups hopes that NCCUSL finishes its work soon, but she recognizes that NCCUSL’s work may take a couple of years.

Ms. Toups says she googled “TOD deeds,” which generated 273,000 hits, so she did not review them. She narrowed her search to ask for a “TOD deed book,” and received 3,980 hits, so she did not review those either.

Ms. Toups gives a glimpse of her background and why she has an interest in TOD deeds for California. Ms. Toups says she is 80 years old and has lived a long time. As an ABA “leader,” she has worked with attorneys at a national level. Those attorneys have ridiculed California because of our antiquated probate system [As the Reporter recalls, our Trusts and Estates Section sprung from an ad hoc group formed in the 1960’s to consider whether California should adopt the UPC, and which group rejected the UPC.] Ms. Toups says she grew up in a small town in Ohio during the Depression. No one had any money. Those most admired in town were the doctors and lawyers, who took care of everyone’s needs. Ms. Toups went to law school in her 40’s.

Again, Ms. Toups says that people ask her why California has not adopted the revocable TOD deed. And Ms. Toups’ response is that the trusts and estates attorneys are against it. And then, she says, those people with whom she is conversing tell a lawyer joke. Ms. Toups will leave her handouts for us to copy, if we wish.

Ms. Toups advises that Assemblyman DeVore is in the process of submitting a bill like “AB250” this year. She will continue to work to enact that bill. Ms. Toups references Ms. Ito, who has been sitting beside her during the meeting. Ms. Toups acknowledges that she and Ms. Ito do not think the same way regarding revocable TOD deeds, but Ms. Toups says she admires Ms. Ito enormously, and correctly observes that we are lucky to have her. Ms. Toups concludes by saying that revocable TOD deeds are not a wacky, crazy idea that a Legal Aide attorney dreamed up; instead, attorneys across the country support it. Chair Tong thanks Ms. Toups for her comments, and asks Ms. Orloff to scan Ms. Toups’ material to put in our Workroom.

COMMITTEE REPORTS

III. NCCUSL – Chair NANCY HOWARD

A. Uniform Guardianship Law

STERN

A paragon of efficiency, Mr. Stern provides a five-page handout providing “Comments” on the Uniform Adult Guardianship and Protective Proceedings Act (“UAGPPA” or “Act”) for this meeting. The handout summarizes the Articles of UAGPPA, and at page five states four general conclusions and considerations. Mr. Stern says the Act uses the term “guardianship” to refer to a conservatorship of a person, and “protective proceeding” to refer to conservatorship of the estate. Any attempt to incorporate this Act in California will require rewriting the Act to adopt California’s verbiage.

Mr. Stern says the gist of the Act is to coordinate between states where competing proceedings exist. The “home state” is where the proposed conservatee was physically present, including temporary absences, for the six months prior to the filing of the proceeding. The “significant connection” state is a state with which the individual has significant connection, including consideration of “location of the individual’s family and persons entitled to notice; the length of

time the individual was in the state; location of the individual's property; and the extent to which there are other ties: voting registration, filing of tax returns, vehicle registration, drivers license, social relationships, and receipt of services."

A major concern is the extent to which the Act would allow a person residing in California, or whose property is in California, to be subject to the less protective law of another jurisdiction. As the introduction to the Act states, one exception to Full Faith and Credit is for guardianship/conservatorship proceedings. In fact, California law may be much more protective than the law in sister state jurisdictions.

Mr. Stern turns to handout page 5, referencing the issues which he has raised. First, he recommends referring the Act to CLRC, especially because of the need to conform the terms of the Act with California law. Mr. Horton says we could ask CLRC to take it on as a project; but CLRC is frequently overburdened with work. We do not yet know if CLRC will be impacted by the looming state budget crises. Mr. Bercovitch injects that the State Bar wants input from TEXCOM and the Judicial Council regarding whether the Act should be introduced. The answer seems to be that the Act should certainly not be introduced in this form at this time.

Mr. Corey says that Dan Pone (Judicial Council) et al. recently had a meeting. No one supports introducing the Act as it is because of the need for conformity and other issues. They considered speaking with Diane Boyer-Vine to learn if she wished to broach the idea with CLRC. [Ms. Boyer-Vine is (1) Legislative Counsel of California; (2) Commissioner on the National Conference of Commissioners on Uniform State Laws (NCCUSL); and (3) a Commission member of CLRC.] Mr. Green says he is not aware that CJA has considered the Act. But Mr. Green is concerned about moving elders from state to state. And he is concerned that to obtain jurisdiction as a "home state" the individual must be physically present in the state for six months prior to filing the proceeding. Mr. Stern responds that Act section 204 outlines special cases where the court may appoint a conservator in an emergency situation.

Mr. Hartog asks what our task is to be regarding the Act. Mr. Stern responds that the objective is for TEXCOM to review and be aware of the Act. Ms. Lodise says the Incapacity Committee has not reviewed the Act in-depth, which causes her concern. Mr. Hartog proposes that the Act be referred to a subcommittee for review and a report, and for TEXCOM's response.

Mr. Bercovitch appreciates our desire to review the Act but he says, a conference call is scheduled for Monday at 12:30 to report to Ms. Boyer-Vine as to whether a bill should be introduced to adopt the Act.

Ms. Lee says the Act could not be introduced in this form. Snatching Mom and spiriting her off to another state is the paradigm. Mr. Corey says that Mr. Horton, Mr. Schenone, and he agree that the Act sounds great, but it may never work. Mr. Stern asks what he shall report as TEXCOM's thoughtful considerations regarding the Act. Mr. Schenone suggests that the Act is needed, but it is not in a form to be introduced. Mr. Green says he sees less than one Mom snatched per year, so "Mom snatching" is not as big an issue as child custody issues.

Ms. Epstein says she does contested conservatorships for a living. In the past 10 years, she has had several cases involving conservatorships that involved sister states. So legislative direction in this area would be helpful. Ms. Lodise suggests that, if TEXCOM wishes Incap to review the Act, then Incap could look at individual situations. Mr. Corey says that, perhaps, Dan Pone and Mr. Bercovitch could convince Ms. Boyer-Vine to encourage CLRC to take on the Act. Chair Tong concludes the matter, saying Mr. Stern and Mr. Bercovitch have our views. We will not take the Act as a project. It seems like a good idea, but it is not ready for prime time. Ms. Potts adds that if CLRC does not take it on, then the Incapacity Committee could work on pieces of the Act that might be useful in California. Ms. Lee agrees that the situation which the Act anticipates coming up in rare cases. But those cases do involve large estates or drastic situations that consume a lot of court time.

B. REPORT ON TEXCOM – NCCUSL relationship

HOWARD

Ms. Howard says she is exploring matters with (former member) Sandy Rae, who is a NCCUSL member.

IV. EDUCATING SENIORS – Chair MARC SALLUS

A. Use of AMA Funds

SALLUS

A handout is entitled Educating Seniors as to Financial Abuse and Estate Planning Scams [free program]. This handout essentially describes the free CLE programs scheduled for March, May and October in San Francisco, Los Angeles, and San Diego respectively, which will instruct Speaker Bureau members in making presentations. For these three programs, the State Bar has approved our use of \$15,000 in AMA funds.

B. Speakers Bureau Reorganization & Training

SALLUS

Two handouts involve reorganizing the Speakers Bureau: (i) Educating Seniors Program Proposal for 2009, and (ii) Independent Contractor Proposal. As discussed extensively at the November 2008 meeting [November Minutes, pp. 15-16], Mr. Sallus is keen on hiring a part time position/individual to coordinate the Speakers Bureau speakers with opportunities to present at Senior Resource Centers and other non-governmental programs and entities. And Mr. Sallus reports that Ms. Orloff already has two possible candidates. Mr. Sallus moves that the proposal to spend \$15,000 of Section funds to employ the independent contractor be adopted.

Mr. Horton asks what would happen in the following budget year. Mr. Sallus replies that this year would be a pilot program, but hopefully it would continue. Ms. Orloff suggests that we modify the independent contractor's work as involving three trimesters since different types of work is being done. Chair Tong notes that the State Bar's Mark Torres-Gil is not able to use AMA funds to pay for personnel. Additionally, Chair Tong notes that the State Bar's "Seniors and the Law Brochure" is to be revised and put in tabloid form. We could also send that brochure out to Senior Centers.

Mr. Sallus moves to fund the independent contractor at \$15,000 for one year with Section funds.

TEXCOM action: All approve.

C. Wills for Heroes

SALLUS

Mr. Sallus says he will develop a proposal for TEXCOM to review regarding providing wills for heroes – i.e. providing estate planning services for firemen, policemen, and emergency workers. This proposal was supported by the Beverly Hills Bar Association; and Mr. Sallus, as its president, became involved in this program.

V. TRUST AND ESTATE ADMINISTRATION – Chair MARGARET HAND

A. Section 16350 Hasso v. Hasso project

SCHENONE

Mr. Schenone will report on the Hasso project at the next meeting. He has posted some work on our website in the Trust and Estate Administration Committee Workroom. The bankers have provided some good input for this project.

B. Section 15403 & 15404 trust modification project - NR

HAND

C. Section 15804 project – NR

HAND

D. Increasing limits for summary proceedings

HAND

A fourteen-page handout is Ms. Hand's draft Legislative Proposal re Collection or Transfer of Small Estate Without Administration and Passage of Property to Surviving Spouse Without Administration, Probate Code sections 13050, 13100, 13101, 13151, 13152, 13154, 13200, 13600, 13601, and 13602.

Presently, when the decedent's statutorily – defined "estate" is relatively small, a decedent's successor in interest may collect from third parties the decedent's assets, using a variety of simplified statutory procedures referenced above. In recent years, two bills would have increased the amount that could be collected using these procedures, but both measures failed in Committee, because the author declined to add language to the bills as requested by other legislators. Those bills were AB 2267 (Huff) in 2006 and SB 553 (Anestad) in 2007. The Trust and Estate Administration Committee proposes legislation nearly identical to AB 2267, except that it would increase some monetary limits further. For specified sections, the current and proposed amounts are as follows:

Section 13100, which allows for transfer without a court proceeding of up to \$100,000 in personal property, would be increased to \$200,000.

Section 13151, which allows for the court-supervised transfer of a decedent's real property, provided the gross value of the decedent's property subject to summary administration (the decedent's estate, less the property described in section 13050) does not exceed \$100,000, would be increased to \$200,000.

Section 13200, which allows a decedent's successor in interest to transfer without a court proceeding real property the value of which does not exceed \$20,000, would be increased to \$100,000.

Section 13600, which allows a surviving spouse to collect the deceased spouse's salary and other compensation, including vacation pay, not exceeding \$5,000, would be increased to \$15,000.

The other Probate Code sections referenced above would be impacted by these proposed monetary modifications.

Mr. Schenone moves that this legislative proposal be approved. In discussion, Ms. Potts says AB 2267 (2006) was railroaded by the Public Guardian because they anticipated an increase in work load, and sought additional fees. SB 553 (2007) was hijacked by heirship lobbyists, who asserted that most fraud occurs in these smaller estates.

Chair Tong says this proposal would be introduced in 2010, and we are simultaneously working on an informal elective probate administration proposal. Is there any inconsistency? Authoritatively, Mr. Hartog states there is no inconsistency in these proposals. Mr. Stern agrees with Mr. Hartog, saying that we should adopt this proposal and also pursue the informal elective probate administration proposal.

Mr. Bercovitch says the Public Guardian's issues may be resolved. In the draft legislative proposal, we need to do some additional work on the narrative, which could simply be revised.

TEXCOM action: All support this legislative proposal.

Mr. Schenone says the current version of this proposal is in the Committee Workroom. Chair Tong adds that final cleanup regarding date of approval, vote, etc. will need to be made.

VI. ETHICS – Chair MEG LODISE

A. ABA 1.14 & RULES Revision Commission

LODISE

Ms. Lodise says the Rules Revision Commission ("RRC") continues to poke along in adopting a form of ABA Model Rule 1.14, which is now to be sent out for comment. Mr. Stern gives some background. ABA Model Rule 1.14 deals with the situation where an attorney cannot act, because of the attorney-client privilege of confidentiality, to protect a client who is now incompetent and faced with harm or loss due to an abusive situation. Mr. Stern asks that TEXCOM send in fact patterns it has experienced in that situation.

Mr. Sallus suggests that, in the next E-News, we pose this situation and invite responses. Chair Tong notes that we also have our website discussion board to raise this issue and ask for comments.

VII. INCAPTACITY – Chair MEG LODISE

A. Professional Fiduciaries Bureau – developments

LODISE

Mr. Green observes that we have regulations saying who is not a professional fiduciary, but the statute is not that clear. Last year, Ms. Lawson, Mr. Matulich, and Mr. Green sent in language to resolve that situation, but it was too late. Now charities ask for exemption from the regulation requirements. Mr. Matulich notes that enrolled agents will also be back, seeking exemption from the regulation.

In organizational items, Mr. Matulich says that under the Governor's latest proposal, the Professional Fiduciaries Bureau is to be absorbed under the Board of Accountancy. Mr. Sallus says that his partner, former Chair Oldman, is on the Accountancy Board and can give the background.

Mr. Matulich says only 284 professional fiduciaries have been licensed. Knowing a picture is worth a thousand words, Mr. Matulich has done some doodling in generating a 3-page draft handout to show the location of the licensed professional fiduciaries. The first two pages list California's counties in a spread sheet form, showing the name of the county, the number of licensed professional fiduciaries in the county, the county population, and the persons per professional licensed fiduciary. His third page is a picture of California divided into its various counties, with the number of such licensed fiduciaries listed in each county.

Mr. Matulich notes that the information is a work in progress because the Profession Fiduciaries Bureau has a hundred or so license applications pending. However, the Bureau has seen an increase in the number of those fiduciaries who take, but are not passing, the test. Mr. Matulich says he will post this information in our workroom when it is done. He notes that approximately 1,500 persons were listed on the registry previously, but that figure included CPAs and attorneys. And Mr. Matulich reminds TEXCOM that bank trust officers need not register.

Ms. Lodise adds cause for additional concern. She says the demographics of the 284 licensed professional fiduciaries reflect many being over 50, and some over 60. And 19 counties have no licensed fiduciaries at all. Those counties seem to be the smaller counties, such as Alpine, Amador, Calaveras, Colusa, Del Norte, and so on.

VIII. CONSERVATORSHIP WORKING GROUP – Chair ED COREY

A. Judicial Council Request for Comments

COREY

Mr. Corey says the Judicial Council has posted new invitations to comment on two proposals:

- Authorization to Disclose a Conservatee's or Proposed Conservatee's Protected Health Information to Court Investigators. (Adopt form GC-336)
- Changes In Conservatorship And Guardianship Forms To Reflect 2008 Legislation and the Professional Fiduciaries Act. (Revise forms GC-310, GC-314, and GC-212)

The deadline for comments is January 21, 2009.

GC-336. This new form is a court order that authorizes medical service providers and record keepers subject to federal medical information privacy law and regulations to provide confidential medical information about conservatees or proposed conservatees to court investigators in conservatorship proceedings. The need for this form arose from recent legislation (Assembly Bill 1727, Cal. Stats. 2007, ch 553, section 7, amending Probate Code section 1826). This form addresses the HIPAA requirements. Mr. Sallus suggests including attorneys, as well as court investigators. However, Mr. Corey says that the bill did not address attorneys. Mr. Corey moves to approve form GC-336.

TEXCOM action: All approve.

Mr. Green suggests that we send a letter commenting that the court appointed counsel should also receive that protected health information, just as the court investigator. TEXCOM agrees, and Mr. Corey will include that comment in his letter transmitting our approval.

GC-310, GC-314, and GC-212. The proposed revision of the referenced forms is required by Assembly Bill 1340 (Cal. Stats. 2008, ch. 293, section 1). In short, the proposed revision of the *Petition for Appointment of Probate Conservator* (form GC-310) would add allegations required by AB1340, including license information under the new Professional Fiduciaries Act for professional fiduciaries who petition to be appointed as conservator. The confidential screening forms for the proposed conservators and guardians (forms GC-314 and GC-212), would be revised to delete obsolete requests for information and replace them with requests for information relevant under the Professional Fiduciaries Act.

Mr. Corey proposes, regarding form GC-310, we comment that if the proposed conservator is not licensed, that the proposed conservator list why he or she is not licensed. Ms. Epstein says the form questions who engaged the petitioner to file the petition and how that was done. What does that mean? We should suggest adding clarity. Mr. Green gives an example. A hospital may have a patient who has become incompetent but who should also be discharged. If no one else is available, the hospital may engage a person to petition to become conservator to authorize the discharge. TEXCOM discusses this matter briefly. Ultimately, Mr. Corey moves that we suggest putting in the form a requirement that a proposed conservator list why they are exempt from licensing, both in the form and in the petition.

TEXCOM action: All approve except two; oppose – 2.

IX. EADE – Co-chairs JOHN HARTOG and NEIL HORTON

Mr. Hartog opens by announcing that he will take straw polls to guide this ongoing saga involving elective administration of decedent's estates ("EADE"). The Committee has now come full circle on the issue of how the proceeding is to commence. The purpose of EADE is to permit functional families to have an expedited process to transfer assets.

How do we commence the proceeding? As currently drafted, a person presents an application to administer a decedent's estate to the court clerk, who then certifies the proceeding, allowing the

person to collect and distribute the decedent's assets. Concerns have arisen regarding clerks passing on the substance of the application, which may exceed the scope of a clerk's duties under the Governmental Code. Additionally, there are concerns regarding will interpretation.

Now the Committee is thinking of having a noticed hearing, like a Probate Code section 13150 proceeding – i.e. the petition would contain the appropriate allegations, be put on calendar, and if a “go,” would be put on the pre-approved list. If someone objects to the petition, then the proceeding is converted to Division 7. Accordingly, if approved, the court would “pass” on the will, but would have no further involvement, and title to the property would be changed in the fashion of a section 17200 trust proceeding. Committee thinking does not anticipate publication. The law applicable to will interpretation would be the rule.

Mr. Green observes that if a petition is filed, then the petition might be in the alternative to convert to full administration if an objection were received. Mr. Schenone says he proposed that idea, but the Committee expressed concern that the alternative petition would detract from prompt review. TEXCOM discussion occurs.

Mr. Horton suggests bifurcating the discussion regarding noticed hearing and publication. He adds that, in a noticed proceeding, the court would determine that the proceeding is appropriate. Mr. Sullivan suggests that we call a UPC state to learn of its experiences. For example, under the UPC in Colorado, a court commissioner (not a clerk) makes determinations regarding the appropriateness of a petition. Ms. Lee injects that California cases conclude it is unconstitutional for a clerk to issue an order which requires an exercise of judicial discretion. Additionally, if we are anticipating possible “objections,” we must anticipate those objections from people acting in pro per. She observes our court clerks are “window clerks” who merely review a petition to learn if all the boxes have been checked, such as in an affidavit proceeding. Mr. Ehrman agrees that a noticed hearing should occur, which hearing would facilitate Legislative enactment. But he expresses the hope that, some day, elective decedent estate administration would be like a trust proceeding.

Noticed Hearing Vote. Mr. Hartog frames the first straw vote regarding draft Division 9. The thought is to just have a noticed hearing, and the rest of Division 9 would remain the same. So the court would simply pass on the validity of the will. Additionally, intestate estates should begin with the noticed hearing. Mr. Baer echoes the conclusion that we would have a noticed hearing for Division 9 to apply. In passing, Mr. Kohlmann observes that if Division 9 were available, then he would feel compelled to use it. Mr. Horton calls the straw vote: How many favor having a noticed hearing to commence a Division 9 proceeding.

TEXCOM action: Aye – all to 2; oppose – 2; abstain – 3.

Publication. Mr. Horton recalls that he called for a bifurcated vote regarding the noticed hearing and publication. Does anyone wish to discuss publication? Mr. Hartog says we previously exhausted that topic. But Mr. Schenone says he has re-thought the matter. If we go before a judge, then that changes his view. Let's provide an alternative to allow publication. Mr. Green bears his thoughts. For the benefit of new members, Mr. Green says he is against elective administration. However, if elective administration is authorized, then the option to publish

should be available to give notice to, and therefore bind, unknown third parties. Mr. Ehrman agrees with Mr. Green. Mr. Stern asks Mr. Hartog if he could frame proposals in writing for an upcoming meeting. And Mr. Hartog says, "Yes."

Mr. Stern says it would be helpful to know how sister states handle informal administration. He recalls sitting next to a couple of Texans who thought informal administration worked very well. Mr. Horton says that on January 23, 2009, he and Mr. Hartog will be speaking with two Colorado attorneys regarding informal administration and how it works out in practice involving title insurance. Chair Tong says having that practical information will be helpful. Mr. Green encourages TEXCOM to do a survey of other UPC states and take another year in the project.

X. CLRC – Chair DAVID BAER

Chair Tong asks if CLRC is interested in a UTC study. Mr. Horton reports that CLRC will continue to carry the UTC study on its agenda if TEXCOM is still interested in finding an author for the study. Mr. Horton told Mr. Hebert that TEXCOM was not still interested in finding an author for the study and Mr. Hebert said that CLRC will drop the UTC study from its agenda.

A. Care Custodian Project (Section 21350)

HORTON

Mr. Horton says Senator Harman will carry legislation regarding the Care Custodian, as well as a cleanup bill on the No Contest Clause. Mr. Green asks if declaratory relief is still available for pre-2001 irrevocable instruments. Mr. Horton responds, "Yes."

B. Attorney Client Privilege after Death

Mr. Baer says CLRC approved the staff Tentative Recommendation on the attorney client privilege after death and will look for a legislative sponsor to propose a non-controversial amendment to the Evidence Code, stating a subsequently appointed personal representative will be the holder of the attorney-client privilege (See November 2008 Minutes p. 11). CLRC also proposes to amend Probate Code section 957, and will also receive comments on the Moeller case involving a successor trustee as the holder of the privilege from a prior trustee.

C. Clean up on No Contest Clause – [see "A," supra.]

XI. LITIGATION – Chair DAVID BAER

A. New project: Evidentiary hearings for Probate proceedings

BAER

This project arises from a recent case, *Estate of Bennett* (2008) 163 Cal. App. 4th 1303, regarding when a party is entitled to an evidentiary hearing in a probate proceeding. The case involved a motion involving the enforceability of a settlement agreement. We are not concerned about the holding, except the court of appeal said a party was entitled to an evidentiary hearing. Probate Code section 1000 says that, unless a special rule applies in the Probate Code, then the Code of Civil Procedure applies. Probate Code section 1022 states affidavits are only admissible in non-controversial proceedings. Code of Civil Procedure section 2009 says that in a special

proceeding, or in seeking provisional remedies, motions are heard on the papers. But *Estate of Bennett* says CCP section 2009 is not applicable.

Mr. Baer is concerned because we would not want routine law and motion matters to involve evidentiary hearings. That is, the Code should spell out these provisions more specifically. Mr. Baer notes that recently, in San Francisco, the Probate Court initially intended to hold an evidentiary hearing on a motion involving venue.

B. Probate Code section 15804

BAER

Mr. Baer says we are reviewing Probate Code section 15804 re notice which is proper for minors or unborn beneficiaries. Of course, an order obtained based on improper notice is open to a due process challenge.

XII. MEMBERSHIP AND MARKETING – Chair BECKY SCHROFF

A. New Materials

A two-page handout is an advertisement by the Labor Employment Law Section, which lists its available online education programs. Ms. Schroff says our online programs are profitable. She is considering our possibly spending \$500 to type up a similar brochure for distribution on our E-News. As is typical, however, Mr. Gaw is ahead of the game. Mr. Gaw says that he put that list of our available online programs in the E-News that issued two days ago, and which listed three pages of “Online CLE and Podcasts from the Trusts and Estates Section.” And Ms. Schroff says we may wish to delete older programs.

Ms. Orloff suggests that we also put that list of available on-line programs on our website. Our financial reports show growth in revenue from online MCLE, and we have not marketed these programs before.

B. Membership Count – NR

C. Advertising in E-News – NR

D. Clean up of out of date online courses – see item “A,” supra.

XIII. INCOME AND TRANSFER TAX – Chair JEFF JAECH

A. Eagle Lodge West project on trust income tax

Eagle Lodge West has a project to address trust taxation, especially where the trust is not paying out taxes currently. If a trust has a California trustee, then the trust is taxed in California. The project targets a change in that law. And what if a trust has co-trustees, but only one is in California? The objective is to avoid taxation in California. The project particularly involves the Taxation Section and the FTB.

Mr. Schenone says that each year Eagle Lodge West (a think tank) proposes ideas to impact tax law.

XIV. ESTATE PLANNING – Chair SIL REGGIARDO

A. Rule Against Perpetuities project – NR

**B. Statutory Power of Attorney
Probate Code 4462-4464 – legislative fix**

HOWARD

Ms. Howard says this project for a legislative fix is to harmonize the Statutory Power of Attorney and the general power of attorney. At the last meeting, the Statutory Power of Attorney Sub-Committee (Ms. Howard, Mr. Crickard, and Ms. Schroff) presented a 7-page analysis proposing legislation and a 15-page draft of proposed amendments. (See November 2008 Minutes, pp. 12-14) The Sub-Committee's goal is to have the legislative proposal for TEXCOM's review at the next meeting.

C. Notarization of wills

REGGIARDO

Known as a spark plug for change, Mr. Reggiardo rolls out a 2008 amendment to the UPC allowing wills to be signed before a notary as due will execution. The Estate Planning Committee did not have strong views on adopting this UPC amendment into California law. [But, as occurred today, sometimes a gentle wind turns into a gale storm of change.]

Mr. Reggiardo gives additional background. The UPC comments regarding notarization as proof of will stated that many documents are signed before a notary, and why not wills. But Mr. Reggiardo says he is uncomfortable with a blanket rule allowing a notary to prove a will. Under current California law, two witnesses not only state that the signature is genuine, but also that the testator is competent. Perhaps we might consider a rule that if an attorney prepares a will, which states that it may be signed before a notary, then this procedure would provide protection. Waxing somewhat philosophic, Mr. Reggiardo observes that proof of will by notarization presents a "want" rather than a "need," if the matter is considered to be controversial. He invites TEXCOM to discuss the matter to learn whether it is controversial.

With typically firm convictions, and keen insight on opportunities for change, Mr. Hartog suggests that the Committee should go at this analysis from the other end, and create more formalities in trust execution. Mr. Reggiardo counters that, with a living trust, attorneys are typically involved and the potential for abuse is reduced. Quite surprisingly, typically overly-protective Mr. Green simply comments that notaries are easier to find than witnesses, so we should allow notarization. A stickler for detail, Mr. Horton asks if the notary would make the same statements as required by a witness. And Mr. Reggiardo replies that the UPC does not specify the content of the witness/notary statement. Mr. Horton responds that notarization would be okay, if the notary made the same statement as a witness – i.e., that the signature is genuine and that the testator has capacity.

Ms. Ito raises a red flag. Earlier this week she had a case where a pour-over will was the vehicle of elder abuse. She notes that having two witnesses is a good practice. Ms. Lee comments that such notarization interacts with proof of a will, so she agrees with Mr. Horton that the notary should provide the same statement as a witness. And Mr. Stern also agrees with Mr. Horton's comment.

So Mr. Hartog, seeking absolute clarity, asks if the UPC amendment would then only require one witness, and not two. Mr. Reggiardo says we are simply dealing with a balancing act. Mr. Matulich observes that the notary typically only acknowledges the signature, and does not verify capacity. Mr. Green says we should make a bright line. We should simply allow notarization of wills or not. If you add further requirements, with the notary verifying capacity, then notarization becomes more complicated. Ms. Epstein agrees with Mr. Green.

Mr. Reggiardo skillfully phrases several motions for TEXCOM vote:

(1) How many agree that notarization alone might acknowledge a will?

TEXCOM action: None.

(2) How many would support using present attestation language and notarization – i.e. the notary would be one witness with a self-proving attestation.

TEXCOM action: None.

(3) How many would authorize an attorney to prepare a will which says it may be signed before a notary?

TEXCOM action: None.

Mr. Reggiardo concludes that TEXCOM has now considered the 2008 amendment to the UPC allowing notaries to witness a will and found it to be a bad idea.

Having raised a change in trust law from this innocent amendment to the UPC, Mr. Hartog asks that the Estate Planning Committee consider whether to require more rigorous signing requirements for all trusts. Mr. Green agrees with Mr. Hartog. Mr. Gerson says that requiring additional formality for trust execution also involves a balancing act. Mr. Gerson says he formerly practiced in Florida where executing testamentary trusts had the same formality as a will. Mr. Hartog makes his position clear, saying that trusts need the same proof as a will.

Ms. Lee comments that we have wills and will substitutes. She finds herself agreeing with Mr. Hartog. But she is not sure whether adding formalities for trust execution is moving to the dark side or to the light. Nevertheless, trust contests are more difficult to resolve than will contests because wills do have two witnesses. Flinching slightly, Mr. Reggiardo asks Mr. Hartog if he wants two witnesses for a trust. And Mr. Hartog says: “Yes.” A pragmatist, Chair Tong says no vote on this question is necessary. The Estate Planning Committee should study whether more formality should exist in the execution of trusts.

XV. TECHNOLOGY – Chair DAVID GAW

A. E-News

GAW

Mr. Gaw says our Section E-News just went out on January 8.

B. Workroom issues

HENDEN

Ms. Henden reports having a very productive session with Ms. Orloff regarding technology, formatting, archiving, etc. for our workroom. Ms. Henden says the Committee will work on enhancing technology this year. She welcomes TEXCOM participation.

Ms. Orloff says the State Bar this year will do a massive renovation of the State Bar website. One objective is to stream line the website and keep it current. For example, the State Bar homepage is to be updated once per month. Ms. Orloff says she will report further as information arises.

Chair Tong again reminds TEXCOM to calendar Committee and Sub-committee meetings in our workroom. Ms. Henden says the Committee is working to come up with the best technology practices on several items, and will do a webinar. Mr. Sallus comments that frustration is the primary emotion in dealing with meetings that are not listed in the workroom. Ms. Lodise comments it would be useful to be able to toggle back and forth in the workroom. A patient man, Mr. Stern says you can set up a Committee meeting in the workroom in only three-four minutes.

C. Members webpage content review - NR

HENDEN/REGGIARDO

XVI. EDUCATION – Chair BART SCHENONE

A. Report from Annual Meeting

SCHENONE

Mr. Schenone says our annual meeting programs were very successful, except many people commented that the rooms were too cold.

B. SEI – January 16-18, 2009

SCHENONE

Mr. Schenone says our Winter SEI session is coming. His handout notes that we have five programs scheduled. The SEI is providing one-hour programs this year and giving all the material in a CD Rom, with no paper. This process may be interesting.

C. Stand Alone Programs

SCHENONE

1. Sophisticated Estate Planning – April 17, 2009

Mr. Schenone says this program will focus on GRAT, QPRTS, and other sophisticated instruments and sophisticated charitable vehicles. Mechanics Bank will be co-hosting this event, contributing \$6,000; and with their sponsorship, we have hired Skip Fox to speak for \$4,500. An ACTEC fellow, Mr. Fox has given many educational seminars on sophisticated topics. He is with McGuire Woods, LLP, in Virginia.

2. The Legal Specialization Exam and You – June 26, 2009

Messrs. Gaw and Quillinan will give this program for preparing to take the certification test in estate planning, trust and probate law, which is given in August, 2009.

Additionally, Mr. Schenone notes that our traditional Roadshow will be in November 2009.

D. Your Legal Rights

SCHROFF

1. Speaking on programs

Ms. Schroff invites TEXCOM to speak on Your Legal Rights radio programs.

2. Programs for 2009

Ms. Schroff says that an early champion for elder abuse programs in District Attorney's offices, Paul Greenwood [San Diego County District Attorney's Office] participated in an elder abuse program. Next month, Your Legal Rights will have a program on special needs trusts.

CEB. Our capable liaison from CEB, Suzanne Goode, provides a handout of upcoming CEB programs in the Trusts and Estates area. She adds that all programs are available on demand.

XVII. QUARTERLY – Executive Director: PHIL HAYES; Editor: ANDY ZABRONSKY

A. Fall issue

Mr. Brown says the Fall Issue is out, and the editors are working on the Winter Issue.

B. Spring issue deadlines

1. Manuscripts – February 1, 2009
2. Alerts – March 1, 2009

Advertising. Ms. Howard says one Quarterly advertiser canceled a one-quarter page ad, but two other advertisers paid for their ads a year in advance.

XVIII. CONFERENCE OF DELEGATES – Chair MARC SALLUS – NR

XIX. NEW BUSINESS

Mr. Horton says many practitioners have raised questions about obtaining a refund on filing fees paid under the filing fee system which was declared unlawful. Mr. Sallus says that in Los Angeles County forms are available to be filled out. Mr. Crickard adds that, in San Diego County, forms are available. And Mr. Pharies says that he successfully filed a form for a refund where the representatives had been discharged.

Mr. Sallus observes that one problem in Los Angeles County and elsewhere is the inconsistency in filing fees after the initial opening fee is paid. Ms. Potts injects that the law now requires consistent filing fees. As of January 1, 2009, we also had fee changes. Some fees went from \$40 to \$350. But at least the fees are to be consistent.

XX. UPCOMING ATTRACTIONS

- A. SEI – January 16-18 Claremont Hotel & Spa**
- B. TEXCOM MEETING – February 7, 2009 LAX HILTON**
- C. SPEAKERS' BUREAU TRAINING – March 4, 2009 SF STATE BAR OFFICES**

Leonard W. Pollard II (Reporter)



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2107

January 9, 2009

Mr. Peter Stern
Trusts & Estates Section
The State Bar of California
400 Cambridge Avenue, Suite A
Palo Alto, CA 94306

Ms. Maylee Tong
Trusts & Estates Section
The State Bar of California
318 Harrison Street, Suite 102
Oakland, CA 94607

Re: *Guide to the California Rules of Professional Conduct for
Estate Planning, Trust and Probate Counsel*

Dear Mr. Stern and Ms. Tong:

As Chair and on behalf of the State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC"), I wish to congratulate your section and its leadership for its updated 2008 edition of the **Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel**. Members of our Committee have reviewed the publication with great interest and it was the subject of discussion at our September meeting.

A review of the guide suggests that there are quite a number of significant and recurring areas of uncertainty and controversy involving the professional responsibilities of attorneys who handle estate planning, and the administration of trusts and estates. We would like to encourage your Section to bring ethics issues or inquiries involving your areas of practice to our attention so that they might be addressed by formal COPRAC opinions.

We also believe that COPRAC's work would be enhanced by having members with expertise in trust and estates. Toward that end we encourage your Section to advance the names of potential candidates who would be interested in serving on our Committee. Applications are available online and are due on February 1, 2009.

If you have any questions about COPRAC and its work, I would be happy to discuss them with you.

Very truly yours,

Suzanne M. Mellard, Chair
Committee on Professional
Responsibility and Conduct

Copy: Members, COPRAC

L'AUBERGE DEL MAR

POSSIBLE RETREAT TOPICS

1. Trust execution requirements – should witnesses or notarization be required?
2. Notarized wills per UPC – will allowing notarized wills facilitate testator intent? Is it necessary?
3. Bad intestate cases – should California intestate laws be amended to change “bad” intestacy cases?
4. Explore UTC or UPC provisions to incorporate into California law
5. Website revamp
6. Deflationary probates –helping members cope

ASSEMBLY BILL

No. 129

Introduced by Assembly Member Ma

January 16, 2009

An act to add Sections 7099.1 and 21028 to the Revenue and Taxation Code, and to add Section 13019 to the Unemployment Insurance Code, relating to taxation, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 129, as introduced, Ma. Confidentiality: taxpayer communications.

Under existing law, the Employment Development Department, the State Board of Equalization, and the Franchise Tax Board administer various taxes and fees.

This bill in modified conformity with federal income tax laws would, with respect to tax advice, require that certain protections of confidentiality that apply to a communication between a client and an attorney also apply to communications between a taxpayer and any federally authorized tax practitioner that appears before those state agencies to the extent that the communication would be considered a privileged communication if it were made between a client and an attorney.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 7099.1 is added to the Revenue and
2 Taxation Code, to read:

3 7099.1. (a) (1) With respect to tax advice, the protections of
4 confidentiality that apply to a communication between a client and
5 an attorney, as set forth in Article 3 (commencing with Section
6 950) of Chapter 4 of Division 8 of the Evidence Code, also shall
7 apply to a communication between a taxpayer and any federally
8 authorized tax practitioner to the extent the communication would
9 be considered a privileged communication if it were between a
10 client and an attorney.

11 (2) Paragraph (1) may only be asserted in any noncriminal tax
12 matter before the State Board of Equalization.

13 (3) For purposes of this section:

14 (A) "Federally authorized tax practitioner" means any individual
15 who is authorized under federal law to practice before the Internal
16 Revenue Service if the practice is subject to federal regulation
17 under Section 330 of Title 31 of the United States Code, as
18 provided by federal law as of January 1, 2000.

19 (B) "Tax advice" means advice given by an individual with
20 respect to a state tax matter, which may include federal tax advice
21 if it relates to the state tax matter. For purposes of this
22 subparagraph, "federal tax advice" means advice given by an
23 individual within the scope of his or her authority to practice before
24 the federal Internal Revenue Service on noncriminal tax matters.

25 (C) "Tax shelter" means a partnership or other entity, any
26 investment plan or arrangement, or any other plan or arrangement
27 if a significant purpose of that partnership, entity, plan, or
28 arrangement is the avoidance or evasion of federal income tax.

29 (b) The privilege under subdivision (a) shall not apply to any
30 written communication between a federally authorized tax
31 practitioner and a director, shareholder, officer, or employee, agent,
32 or representative of a corporation in connection with the promotion
33 of the direct or indirect participation of the corporation in any tax
34 shelter, or in any proceeding to revoke or otherwise discipline any
35 license or right to practice by any governmental agency.

36 (c) This section shall be operative for communications made
37 on or after the effective date of the act adding this section.

SEC. 2. Section 21028 is added to the Revenue and Taxation Code, to read:

21028. (a) (1) With respect to tax advice, the protections of confidentiality that apply to a communication between a client and an attorney, as set forth in Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, also shall apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a client and an attorney.

(2) Paragraph (1) may only be asserted in any noncriminal tax matter before the Franchise Tax Board.

(3) For purposes of this section:

(A) "Federally authorized tax practitioner" means any individual who is authorized under federal law to practice before the Internal Revenue Service if the practice is subject to federal regulation under Section 330 of Title 31 of the United States Code, as provided by federal law as of January 1, 2000.

(B) "Tax advice" means advice given by an individual with respect to a state tax matter, which may include federal tax advice if it relates to the state tax matter. For purposes of this subparagraph, "federal tax advice" means advice given by an individual within the scope of his or her authority to practice before the federal Internal Revenue Service on noncriminal tax matters.

(C) "Tax shelter" means a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement if a significant purpose of that partnership, entity, plan, or arrangement is the avoidance or evasion of federal income tax or the avoidance or evasion of the tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

(b) The privilege under subdivision (a) does not apply to any written communication between a federally authorized tax practitioner and any person, or any director, officer, employee, agent, or representative of the person, or any other person holding a capital or profits interest in the person in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in Section 1274(b)(3)(B) of the Internal Revenue Code, as modified by subdivision (g) of Section 19164),

1 or in any proceeding to revoke or otherwise discipline any license
2 or right to practice by any governmental agency.

3 (c) This section shall be operative for communications made
4 on or after the effective date of the act adding this section.

5 SEC. 3. Section 13019 is added to the Unemployment Insurance
6 Code, to read:

7 13019. (a) (1) With respect to tax advice, the protections of
8 confidentiality that apply to a communication between a client and
9 an attorney, as set forth in Article 3 (commencing with Section
10 950) of Chapter 4 of Division 8 of the Evidence Code, also shall
11 apply to a communication between a taxpayer and any federally
12 authorized tax practitioner to the extent the communication would
13 be considered a privileged communication if it were between a
14 client and an attorney.

15 (2) Paragraph (1) may only be asserted in any noncriminal tax
16 matter before the Employment Development Department.

17 (3) For purposes of this section:

18 (A) "Federally authorized tax practitioner" means any individual
19 who is authorized under federal law to practice before the Internal
20 Revenue Service if the practice is subject to federal regulation
21 under Section 330 of Title 31 of the United States Code, as
22 provided by federal law as of January 1, 2000.

23 (B) "Tax advice" means advice given by an individual with
24 respect to a state tax matter, which may include federal tax advice
25 if it relates to the state tax matter. For purposes of this
26 subparagraph, "federal tax advice" means advice given by an
27 individual within the scope of his or her authority to practice before
28 the federal Internal Revenue Service on noncriminal tax matters.

29 (C) "Tax shelter" means a partnership or other entity, any
30 investment plan or arrangement, or any other plan or arrangement
31 if a significant purpose of that partnership, entity, plan, or
32 arrangement is the avoidance or evasion of federal income tax.

33 (b) The privilege under subdivision (a) shall not apply to any
34 written communication between a federally authorized tax
35 practitioner and a director, shareholder, officer, or employee, agent,
36 or representative of a corporation in connection with the promotion
37 of the direct or indirect participation of the corporation in any tax
38 shelter, or in any proceeding to revoke or otherwise discipline any
39 license or right to practice by any governmental agency.

1 (c) This section shall be operative for communications made
2 on or after the effective date of the act adding this section.

3 SEC. 4. This act is an urgency statute necessary for the
4 immediate preservation of the public peace, health, or safety within
5 the meaning of Article IV of the Constitution and shall go into
6 immediate effect. The facts constituting the necessity are:

7 In order to ensure that these communications between taxpayers
8 and tax practitioners remain privileged, it is necessary that this act
9 take effect immediately.

LEGISLATIVE PROPOSAL
Statutory form power of attorney amendments

TO: Saul Bercovitch, Staff Attorney, State Bar Office of Governmental Affairs¹

FROM: Nancy E. Howard, Jeremy Crickard and Rebecca Schroff, Members, Executive Committee and Estate Planning Subcommittee, Trusts and Estates Section, State Bar of California

DATE: _____, 2009

RE: Statutory Form Power of Attorney Amendments
An act to amend §§ 4260, 4264, 4401, 4407, 4457, 4458, 4460, 4462 and 4465 of the Probate Code.

SECTION ACTION AND CONTACT(S):

Date of Approval by Section Executive Committee: _____
Approval vote: _____

Contact	Section Legislative Chair
Nancy E. Howard Sheppard, Mullin, Richter & Hampton LLP 333 S. Hope Street, 48 th Floor Los Angeles, CA 90071 (213) 620-1780 (213) 443-2850 [Add Jeremy, Becky, Sil?]	Edward J. Corey, Jr. WEINTRAUB GENSHLEA CHEDIAK 400 Capitol Mall, 11th Floor Sacramento, CA 95814 (916) 558-6017 (916) 446-1611 – fax Email: ecorey@weintraub.com

SUMMARY OF PROPOSAL:

Special protections are included in the law so that an agent acting under a power of attorney cannot take significant actions to dispose of the principal's property during lifetime or at death, and which carry a significant potential for misuse, unless the power of attorney expressly grants that power to the agent. However those limitations do not currently apply to statutory form powers of attorney. This proposal would extend those same protections to statutory form powers of attorney and would clarify, harmonize and remove inconsistencies between statutory form powers of attorney and other powers of attorney regarding these sensitive powers.

ISSUES AND PURPOSE:

Under current law a person may give an agent powers under a general power of attorney through either (1) a specific statutory form set forth in the Probate Code or (2) a power of attorney document that does not use the statutory form.

A power of attorney that is not created by the statutory form grants the agent the broadest possible power to act on behalf of the principal, except as limited by law or by the terms of the power of attorney itself. The law governing such a non-statutory form power of attorney includes special protections limiting certain powers, such as the power to make a gift, the power to name or to change beneficiaries on insurance or annuity contracts or retirement plans, or the power to make a loan to the agent, unless the power of attorney expressly grants those powers to the agent. Thus the agent will not have broad estate planning powers to dispose of the principal's property either during lifetime or at death unless the power of attorney expressly grants those powers to the agent.

A statutory form power of attorney, in contrast, lists certain categories of transactions (such as banking, real estate, or retirement plan transactions). Only the selected categories of powers are granted, but within each category an agent has very broad authority to act. The special protections that limit an agent's authority to take significant estate planning actions do not apply to statutory form powers of attorney.

This creates problems in two ways:

(1) In some cases, the statutory form power of attorney expressly includes powers that could not be given to an agent using a non-statutory form power of attorney unless the powers were spelled out in the power of attorney document itself. For example, §§ 4457(d) and (j) and § 4462(b)¹ allow an agent under a statutory form power of attorney, subject to some restrictions, to designate or change the beneficiary of an insurance policy, an annuity contract or a retirement plan. The agent's powers are only referred to by title in the statutory form (i.e., "Insurance and Annuity Transactions" or "Retirement Plan Transactions"), so a person signing a statutory form power of attorney would not know that the agent had been given the power to change beneficiaries unless the person separately obtained, read and understood a copy of the statute. In contrast, the power to designate or change a beneficiary on an insurance policy, annuity or retirement plan is prohibited under § 4264(f) governing a non-statutory form power of attorney unless the power to name or change a beneficiary is expressly granted in the power of attorney.

(2) Even where the statutory form does not expressly give the agent the power to dispose of the principal's property, the powers that are granted to an agent under a statutory form power of attorney are so broad that they might be used to carry out significant transfers. For example, § 4450(b) of the statutory form power of attorney law permits an agent to "contract in any manner with any person" regarding any of the types of transactions that are covered (real property, banking, etc.). The law governing a non-statutory form power of attorney does not allow an agent to make a loan to himself or herself, unless that power is expressly granted. Since

¹ All section references are to the California Probate Code unless otherwise noted.

those restrictions in the general law do not apply to statutory form powers of attorney, it is not clear whether an agent under the statutory form document could make a loan to himself or herself from the principal's property.

The statutory form power of attorney is sometimes used by lawyers but is more often used without the assistance of a lawyer. The common use of statutory form powers of attorney without legal advice creates both a greater potential for abuse by unscrupulous persons and also a greater chance that the principal may unintentionally grant his or her agent broader powers than the principal realizes or intends. Because of the widespread use of statutory form powers of attorney without legal advice, it is particularly important that the statutory form include protections so that a principal will not grant broad estate planning powers to an agent unless the principal makes clear that he or she intends to do that.

This proposal would make the existing restrictions in the law, which limit an agent's power to carry out significant transfers of the principal's property during life or at death unless that authority is expressly granted in the power of attorney, applicable in the same manner to a statutory form power of attorney. There are changes to conform and coordinate the corresponding provisions in the general and the statutory form power of attorney law. As a result, persons signing statutory form powers of attorney would be protected from granting broad estate planning powers to their agents unless those powers were explicitly stated in the document being signed.

EXPLANATION OF PROPOSED CHANGES:

The specific statutory changes, and a brief explanation of the purpose of each of them (in brackets), are set forth below. In a few cases, proposed changes are based upon the new Uniform Power of Attorney Act (2006) ("New UPOA Act"), which has been approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). This proposal does not recommend adoption of the entire New UPOA Act, but selected provisions of the New UPOA Act are incorporated where they are relevant to these proposed changes and are otherwise consistent with California law.

ARTICLE 3. AUTHORITY OF ATTORNEYS-IN-FACT

§ 4260. Application of article

This article ~~does not apply to~~ applies to all powers of attorney under this division, including without limitation statutory form powers of attorney under Part 3 (commencing with Section 4400), except that Sections 4261 and 4263 do not apply to statutory form powers of attorney under Part 3.

[All of Article 3 is made applicable to statutory form powers of attorney. The only exceptions are § 4261, which is a broad grant of authority under a general power of attorney and is inconsistent with the statutory form power of attorney's more limited grant of authority, and § 4263, which allows the incorporation of powers from other statutes, which also is inconsistent with the system of self-contained powers in a statutory form power of attorney. All of the provisions of Article 3, sections 4260 – 4265, are reproduced for reference.]

§ 4261. General authority granted

If a power of attorney grants general authority to an attorney-in-fact and is not limited to one or more express actions, subjects, or purposes for which general authority is conferred, the attorney-in-fact has all the authority to act that a person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action.

[No change.]

§ 4262. Limited authority granted

Subject to this article, if a power of attorney grants limited authority to an attorney-in-fact, the attorney-in-fact has the following authority:

- (a) The authority granted in the power of attorney, as limited with respect to permissible actions, subjects, or purposes.
- (b) The authority incidental, necessary, or proper to carry out the granted authority.

[No change.]

§ 4263. Powers incorporated by reference to other statutes

(a) A power of attorney may grant authority to the attorney-in-fact by incorporating powers by reference to another statute, including, but not limited to, the following:

- (1) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power of Attorney Act (Part 3 (commencing with Section 4400)).
- (2) Powers of guardians and conservators provided by Chapter 5 (commencing with Section 2350) and Chapter 6 (commencing with Section 2400) of Part 4 of Division 4.
- (3) Powers of trustees provided by Chapter 2 (commencing with Section 16200) of Part 4 of Division 9.

(b) Incorporation by reference to another statute includes any amendments made to the incorporated provisions after the date of execution of the power of attorney.

[No change.]

§ 4264. Acts requiring express authorization in power of attorney

~~A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney.~~ *An attorney-in-fact under a power of attorney, including without limitation a statutory form power of attorney under Part 3 (commencing with Section 4400), may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants that authority to the attorney-in-fact:*

[This section, which limits certain powers that would allow an agent to take significant estate planning actions and that carry an increased risk of abuse, is changed from a rule of construction to an affirmative statement of the requirement that such sensitive powers must be expressly granted in a power of attorney. It is explicitly made applicable to statutory form powers of attorney as well as to other non-statutory form powers of attorney.]

(a) Create, modify, ~~or revoke a trust~~ *revoke or terminate a trust, in whole or in part.* *If a power of attorney under this division empowers the attorney-in-fact to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the attorney-in-fact as provided in the trust instrument.*

[The power to "terminate" a trust is used in the New UPOA Act and is added in the first sentence. The power to "revoke" implies a power over a trust created by a principal, while the power to "terminate" could apply to a power granted under a trust created by another. The language "in whole or in part" is added to make clear that a partial exercise of the power is covered by the statute.]

[The second sentence makes explicit that the power of an agent to amend or revoke a trust, even if granted in the power of attorney, must also be permitted by the trust instrument. That restriction currently applies to all powers of attorney, as provided in Probate Code § 15401(c). Section 4465, governing statutory form powers of attorney, repeated this restriction, and the text of that portion of § 4465 is moved to this section, which applies to all powers of attorney.]

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.

(c) Make or revoke a gift of the principal's property in trust or otherwise.

(d) Exercise the right to ~~make a disclaimer~~ *reject, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other fund* on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

[The disclaimer language was broadened to conform to the language deleted from § 4458(a) governing statutory form powers of attorney.]

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

(g) Make a loan to the attorney-in-fact.

§ 4265. Acts that power of attorney may not authorize

A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will.

[No change.]

§ 4266. Exercise of authority; fiduciary duties

The grant of authority to an attorney-in-fact, whether by the power of attorney, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of authority by an attorney-in-fact is subject to the attorney-in-fact's fiduciary duties.

[No change.]

§ 4401. Form

The following statutory form power of attorney is legally sufficient when the requirements of Section 4402 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). *THE POWERS GRANTED BY THIS DOCUMENT DO NOT INCLUDE ALL POWERS THAT ARE AVAILABLE UNDER THE PROBATE CODE.* IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

[A sentence is added to the required notice in the introductory paragraph of the statutory form, alerting the user that the statutory form power of attorney does not grant the agent all possible powers that are allowed by law. Because the powers that are restricted under § 4264 are particularly sensitive and are subject to possible abuse, we do not recommend listing those powers in the form in a "check-the-box" format. Instead, as with any question about the scope or limits on the agent's powers, the principal is encouraged to seek competent legal advice.]

§ 4407. Application of division to statutory form power of attorney; conflicting provisions

~~Unless~~*The provisions of this division shall apply to statutory form powers of attorney except where there is a conflicting provision in this part, in which case the provision of this part governs, the other provisions or where a provision of this division apply is expressly made inapplicable to a statutory form power powers of attorney.*

[This is a technical change to make clear that an express provision in the power of attorney law (such as the existing or proposed § 4260) may make a particular provision of the general power of attorney law inapplicable to a statutory form power of attorney.]

§ 4457. Insurance and annuity transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by the agent.

~~(d) — Designate the beneficiary of the contract, but the agent may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to the extent the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.~~

[Subsection (d), giving an agent under a statutory form power of attorney the power to designate a beneficiary of an insurance or annuity contract, is deleted. That is a sensitive power that under § 4264(f) must be expressly granted in the power of attorney.]

(ed) Apply for and receive a loan on the security of the contract of insurance or annuity.

(fe) Surrender and receive the cash surrender value.

(gf) Exercise an election.

(hg) Change the manner of paying premiums.

(i/h) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity with respect to which the principal has or claims to have a power described in this section.

~~(j) — Change the beneficiary of a contract of insurance or annuity, but the agent may not be designated a beneficiary except to the extent permitted by subdivision (d).~~

[Subsection (j), giving an agent under a statutory form power of attorney the power to change a beneficiary of an insurance or annuity contract, is deleted. That is a sensitive power that under § 4264(f) must be expressly granted in the power of attorney.]

(k/i) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal.

(l/j) Collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal in a contract of insurance or annuity.

(m/k) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

§ 4458. Estate, trust and other beneficiary transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including the power to do all of the following:

(a) Accept, ~~reject, disclaim,~~ receive, receipt for, sell, assign, ~~release,~~ pledge, or exchange, ~~or consent to a reduction in or modification of~~ a share in or payment from the fund.

[The power to disclaim (and similar powers) are deleted from § 4458(a), as those are sensitive powers that under § 4264(d) must be expressly granted in the power of attorney.]

(b) Demand or obtain by litigation or otherwise money or other thing of value to which the principal is, may become, or claims to be entitled by reason of the fund.

(c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal.

(d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.

(e) Conserve, invest, disburse, and use anything received for an authorized purpose.

(f) Transfer an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property, to the trustee of a revocable trust created by the principal as settlor.

(g) *Disclaim a detrimental transfer to the principal with the approval of the court.*

[Section 4264(d) expressly allows an agent to disclaim a detrimental transfer with court approval, even though a disclaimer otherwise is a sensitive power that must be expressly granted in the power of attorney document. Because the power to disclaim generally has been removed from the statutory form power of attorney, and because the statutory form power of attorney gives the agent only those powers that are listed in the statute, an agent's limited power to disclaim a detrimental transfer is added here.]

§ 4460. Personal and family maintenance; powers granted

In a statutory form power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to do all of the following:

(a) Do the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals.

(b) Provide for the individuals described in subdivision (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subdivision (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by the principal, for the individuals described in subdivision (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subdivision (a) and open new accounts the agent considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization and continue contributions to those organizations.

(g) *Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this division.*

[A new subsection (g) is added, stating that the powers of personal and family maintenance that are listed in § 4460 are not limited by any authority or lack of authority regarding gifts generally. This is a provision that was included in the New UPOA Act and currently has no counterpart in California law. However, we believe that most laypersons do not think of such family support matters as "gifts" and would expect that such actions are permitted if they check this box, without technical distinctions about whether a particular expenditure is part of a legal support obligation or is a gift.]

§ 4462. Retirement plan transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to do all of the following:

(a) Select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals.

~~(b) Designate beneficiaries under those plans and change existing designations.~~

[Subsection (b), giving an agent under a statutory form power of attorney the power to designate or change a beneficiary under a retirement plan, is deleted. That is a sensitive power that under § 4264(f) must be expressly granted in the power of attorney.]

(eb) Make voluntary contributions to those plans.

(dc) Exercise the investment powers available under any self-directed retirement plan.

(ed) Make rollovers of plan benefits into other retirement plans.

(fe) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.

(gf) Waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

~~§ 4465 — Trusts; power to modify or revoke~~

~~A statutory form power of attorney under this part does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this part empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.~~

[This section is deleted as the substance is included in § 4264(a), which now will apply to both statutory and non-statutory form powers of attorney.]

§ 4465 *Acts requiring express authorization in statutory form power of attorney*

A statutory form power of attorney under this part does not empower the agent to take any of the actions specified in Section 4264 of the Probate Code unless the statutory form power of attorney expressly grants that authority to the attorney-in-fact.

[This section is added so that the statutory form power of attorney law, Probate Code §§ 4400 – 4465, will include a reference to the restrictions that are now made applicable to statutory form powers of attorney.]

HISTORY:

No similar legislation has been introduced to date.

IMPACT ON PENDING LITIGATION:

There is no known impact on pending litigation.

LIKELY SUPPORT & OPPOSITION:

The Executive Committee, State Bar Trusts and Estates Section supports this legislation. No opposition is anticipated.

FISCAL IMPACT:

There is no anticipated fiscal impact.

GERMANENESS:

The members of the State Bar's Trusts and Estates Section routinely deal with drafting and implementing durable powers of attorneys for clients in connection with their estate planning. Section members are acutely aware of both the value of proper and flexible powers of attorney and the risk of abuse created by overly-broad or ambiguous powers of attorney. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT OF PROPOSAL:

Section 4260 should be amended as follows:

§ 4260. Application of article

This article ~~does not apply to~~ applies to all powers of attorney under this division, including without limitation statutory form powers of attorney under Part 3 (commencing with Section 4400);, except that Sections 4261 and 4263 do not apply to statutory form powers of attorney under Part 3.

Section 4264 should be amended as follows:

§ 4264. Acts requiring express authorization in power of attorney

~~A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney.~~
An attorney-in-fact under a power of attorney, including without limitation a statutory form power of attorney under Part 3 (commencing with Section 4400), may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants that authority to the attorney-in-fact:

(a) Create, modify, ~~or revoke a trust~~*revoke or terminate a trust, in whole or in part. If a power of attorney under this division empowers the attorney-in-fact to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the attorney-in-fact as provided in the trust instrument.*

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.

(c) Make or revoke a gift of the principal's property in trust or otherwise.

(d) Exercise the right to ~~make a disclaimer~~*reject, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other fund* on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

(g) Make a loan to the attorney-in-fact.

Section 4401 should be amended as follows:

§ 4401. Form

The following statutory form power of attorney is legally sufficient when the requirements of Section 4402 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). *THE*

POWERS GRANTED BY THIS DOCUMENT DO NOT INCLUDE ALL POWERS THAT ARE AVAILABLE UNDER THE PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I _____

(your name and address)

appoint

(name and address of the person appointed, or of each person appointed if you want to designate more than one)

as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

- _____ (A) Real property transactions.
- _____ (B) Tangible personal property transactions.
- _____ (C) Stock and bond transactions.
- _____ (D) Commodity and option transactions.
- _____ (E) Banking and other financial institution transactions.
- _____ (F) Business operating transactions.
- _____ (G) Insurance and annuity transactions.
- _____ (H) Estate, trust, and other beneficiary transactions.
- _____ (I) Claims and litigation.
- _____ (J) Personal and family maintenance.
- _____ (K) Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service.
- _____ (L) Retirement plan transactions.
- _____ (M) Tax matters.
- _____ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS
LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS
EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF
ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

**EXERCISE OF POWER OF ATTORNEY WHERE
MORE THAN ONE AGENT DESIGNATED**

If I have designated more than one agent, the agents are to act

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT
TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE
WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT
ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY",
THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. A
third party may seek identification. Revocation of the power of attorney is not effective as to a
third party until the third party has actual knowledge of the revocation. I agree to indemnify the
third party for any claims that arise against the third party because of reliance on this power of
attorney.

Signed this _____ day of _____, 20____

(your signature)

State of _____ County of _____

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Section 4407 should be amended as follows:

§ 4407. Application of division to statutory form power of attorney; conflicting provisions

~~Unless~~*The provisions of this division shall apply to statutory form powers of attorney except where there is a conflicting provision in this part, in which case the provision of this part governs, the other provisions or where a provision of this division applies expressly made inapplicable to a statutory form power powers of attorney.*

Section 4457 should be amended as follows:

§ 4457. Insurance and annuity transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by the agent.

(d) ~~Designate the beneficiary of the contract, but the agent may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to the extent the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.~~
(e) Apply for and receive a loan on the security of the contract of insurance or annuity.

(fe) Surrender and receive the cash surrender value.

(gf) Exercise an election.

- (hg) Change the manner of paying premiums.
- (ih) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity with respect to which the principal has or claims to have a power described in this section.
- ~~(j) Change the beneficiary of a contract of insurance or annuity, but the agent may not be designated a beneficiary except to the extent permitted by subdivision (d).~~ (ki) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal.
- (lj) Collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal in a contract of insurance or annuity.
- (mk) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Section 4458 should be amended as follows:

§ 4458. Estate, trust and other beneficiary transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including the power to do all of the following:

- (a) Accept, ~~reject, disclaim, receive, receipt for, sell, assign, release, pledge, or exchange, or consent to a reduction in or modification of~~ a share in or payment from the fund.
- (b) Demand or obtain by litigation or otherwise money or other thing of value to which the principal is, may become, or claims to be entitled by reason of the fund.
- (c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal.
- (d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.
- (e) Conserve, invest, disburse, and use anything received for an authorized purpose.
- (f) Transfer an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property, to the trustee of a revocable trust created by the principal as settlor.
- (g) *Disclaim a detrimental transfer to the principal with the approval of the court.*

Section 4460 should be amended as follows:

§ 4460. Personal and family maintenance; powers granted

In a statutory form power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to do all of the following:

(a) Do the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals.

(b) Provide for the individuals described in subdivision (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subdivision (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by the principal, for the individuals described in subdivision (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subdivision (a) and open new accounts the agent considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization and continue contributions to those organizations.

(g) *Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this division.*

Section 4462 should be amended as follows:

§ 4462. Retirement plan transactions; powers granted

In a statutory form power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to do all of the following:

(a) Select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals.

~~(b) Designate beneficiaries under those plans and change existing designations.~~
~~———Make voluntary contributions to those plans.~~

(dc) Exercise the investment powers available under any self-directed retirement plan.

(ed) Make rollovers of plan benefits into other retirement plans.

(fe) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.

(gf) Waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

Section 4465 should be amended as follows:

§ 4465 ~~Trusts; power to modify or revoke~~

~~A statutory form power of attorney under this part does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this part empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.~~

Acts requiring express authorization in statutory form power of attorney

A statutory form power of attorney under this part does not empower the agent to take any of the actions specified in Section 4264 of the Probate Code unless the statutory form power of attorney expressly grants that authority to the attorney-in-fact.

As of Date: 2/03/2009

Section Code	Description	No. of Members	No. of Associates
A	Antitrust & Unfair Compet	1404	97
B	Business Law	8824	159
C	Criminal Law	1844	61
D	Law Practice Mgmt	1422	134
E	Trusts & Estates	6249	269
F	Family Law	3570	102
G	Labor & Employment	6341	203
H	Litigation	9747	144
I	Solo & Small Firm	1514	61
J	Legal Services	1357	145
K	International Law	2680	241
L	Environmental Law	1438	74
M	Public Law	7019	388
N	Intellectual Property Law	7623	157
O	Real Property Law	3224	258
P	Senior Lawyers	2639	204
Q	Taxation		
R	Worker's Compensation		

Total number of section members: 66895

Total number of section Associates: 2697

Final Total: 69592

CALIFORNIA PROBATE CODE § 16350

(a) For the purposes of this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or decedent's estate to which Section 16351 applies, a business or activity to which Section 16352 applies, or an asset-backed security to which Section 16367 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate to principal the following receipts from an entity:

(1) Property other than money.

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity.

(3) Money received in one distribution or a series of related distributions in total or partial liquidation of the entity.

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) For purposes of paragraph (3) of subdivision (c):

(1) Money is received in total or partial liquidation of an entity to the extent that the trustee receives information indicating that it is a distribution or one in a series of related distributions in total or partial liquidation of the entity. A trustee may rely, without independent investigation, on a statement made by the entity about the source or character of the receipt or any other information which is actually known by the trustee about the source or character of the receipt. A trustee shall not be liable for allocating a receipt to income or principal under this subdivision if, based on information received or actually known by the trustee, the allocation is made within the shorter of 90 days after the date of the actual receipt or 45 days after the close of the trust's fiscal year.

(2) Money is received in partial liquidation of an entity if the total amount of money and property received by all owners, collectively, in a distribution or series of related distributions is greater than 10 percent of the value of the entity's gross assets, as shown by the entity's yearend financial statements immediately preceding the initial distribution. A trustee may rely on the entity's yearend financial statements as such financial statements are prepared (and as such entity's gross asset value is reported) in the normal course of the entity's business, and without regard to whether such financial statements are audited and prepared in accordance with generally accepted accounting principles. If the entity's yearend financial statements reflect, in footnotes or otherwise, the value of the entity's gross assets according to generally accepted

accounting principles, that value shall control over any other value based on any other accounting method as may be reported in the yearend financial statements.

(3) Notwithstanding the provisions of paragraph (2) of this subdivision (d), if the receipt was allocated between December 2, 2004 and July 18, 2005, a trustee shall not be liable for allocating the receipt to income if the amount received by the trustee, when considered together with the amount received by all owners, collectively, exceeded 20 percent of the entity's gross assets, but the amount received by the trustee did not exceed 20 percent of the entity's gross assets.

(4) Money is not received in partial liquidation, nor may it be taken into account under paragraph (1) or paragraph (2) of this subdivision (d), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary is required to pay on taxable income of the entity that distributes the money.

(e) Nothing contained in this section imposes an affirmative duty on a trustee to ascertain the source or character of a receipt from an entity.

(f) If a beneficiary refuses voluntarily to provide the trustee with the information needed to determine the amount of income tax the beneficiary is required to pay on taxable income of the entity for purposes of paragraph (4) of subdivision (d), the trustee may estimate the amount of the beneficiary's income tax liability based on reasonable assumptions of the relevant factors determining such liability.

ANNOTATIONS:

1. Many of the changes made to section 16350 are designed to address the shortcomings in the current version of the statute, as enacted as part of the revised UPIA. Those shortcomings were partially revealed in the Court of Appeal's decision in Hasso v. Hasso (2007) 148 Cal.App.4th 329. See the excellent discussion of those shortcomings in the article by Andrew Zabronsky and Claudia Lowder, The New Alchemy: Hasso v. Hasso And Converting Principal To Income Under The Revised UPIA, California Trusts And Estates Quarterly, Vol. 14, Issue 1, pp. 11-18.

2. The new statute maintains the existing statutory presumption that a receipt from an entity is presumed to be income, unless it falls within certain specified exceptions that would make it principal. Another version of the statute that reversed this presumption was considered but rejected by the drafting committee.

3. Subdivision (c)(3) was changed to reflect that distributions in total or partial liquidation may be made in one distribution or a series of related distributions.

4. Subdivision (d)(1) reflects changes from the former "entity indication test" in the current statute. The entity indication test placed too much emphasis on actual pronouncements by an entity's board of directors (or comparable group of persons) that, per the Hasso court, needed to invoke the concept of partial or total liquidation in a written statement to the entity's

owners. The new test is a more flexible standard that focuses on the information actually received by a trustee, regardless of its source. The type of information described in subdivision (d)(1) that guides the trustee goes to the source or character of the distribution, and is not necessarily a specific designation invoking the concept of partial or total liquidation. For example, if the entity sends a report to the owners stating that, because of the downturn in the economy the governing board has decided not to make certain planned strategic acquisitions and would instead distribute out to the owners the large amount of working capital that had been accumulated over several years to expand the entity's business operations, that information about the source of the distribution (excess working capital accumulated to grow the business) and the character of the distribution (arising from a constriction of the entity's planned expansion due to economic reasons) would indicate that the distribution is made in partial liquidation of the entity, rather than constituting a distribution of the entity's normal operating profits. Subdivision (d)(1) also allows the trustee to rely on any other information actually known by the trustee, while subdivision (e) makes clear there is no affirmative duty on the trustee to seek out relevant information. For example, a trustee might sit on the entity's board of directors (or might be a managing member of the entity) and, through that role, the trustee obtains information about the source and character of a partial liquidation distribution that, because of the informality of business communications, is not explained to the owners in any written communication from the entity itself. Even though the entity itself has not informed the owners about the source and character of the liquidating distribution, the trustee may rely on the information the trustee has independently received.

5. Subdivision (d)(1) also provides an alternative to the "at or near the time of a distribution" standard contained in the current statute, and is intended to allow the trustee to base its allocation decision upon information that is provided to or actually known by the trustee within a reasonable amount of time after the date of the receipt in question. The former "at or near the time of a distribution" standard was deemed too ambiguous and problematic, since it arguably prevented the trustee from relying upon relevant information that became known sometime after the date of the receipt in question. However, some outer time limit is helpful to enable the trustee to make an allocation decision in the normal course of trust administration (and make a distribution without undue delay to the income beneficiary, if the receipt is allocated to income) without fear of later being challenged about the propriety of the allocation decision. Keeping that outer time limit within the practical limits imposed by the 65-day rule for income tax purposes was also deemed desirable. Accordingly, the drafters opted for a dual time limit that protected the trustee from liability if it made its allocation decision, based on information provided or actually known, within the shorter of 90 days after the date of the receipt or 45 days after the close of the trust's fiscal year.

6. Subdivision (d)(2) changes the "20% gross assets test" in the current statute to a 10% gross assets test. The applicable percentage was reduced from 20% to 10% simply because 20% seemed dangerously high. The drafters considered reducing the percentage even lower, such as to 4% to conform to the presumption recently added to section 16361 relating to uncharacterized distributions from IRAs and similar vehicles. However, that lower percentage seemed to be too low for purposes of a partial liquidation test in the entity context, especially since in the entity context the book values in an entity's yearend financial statements that will be

used for applying the 10% test are often not an accurate reflection of (and are typically much lower than) the actual fair market values of the entity's assets. The drafters also considered changing the "gross assets" standard to a "net worth" standard, since the gross assets standard completely ignores the entity's existing debts and could convert a partial liquidation distribution from a highly leveraged entity from principal to income (assuming sufficient information about the source or character of that distribution was not provided or otherwise known). Nevertheless, because the term "gross assets" is more easily understood from a financial reporting standpoint, and other terms such as "net assets" or "net worth" are less clearly understood in that framework, the gross assets standard was retained despite its potential drawbacks.

7. Subdivision (d)(2) modifies the language dealing with the entity's yearend financial statements. First, the new language makes clear that the trustee may rely on those financial statements as they are prepared in the ordinary course of the entity's business, without regard to whether they are audited or prepared in accordance with GAAP. Many entities do not issue audited or GAAP-compliant financial statements, and it seems useful to make clear that the trustee may rely on those statements without concern over their accuracy or GAAP-noncompliance (and, by corollary, that no beneficiary may complain about the trustee's reliance on those unaudited or GAAP-noncompliant financial statements). Second, the new language also makes clear that if the financial statements do reflect, in footnotes or otherwise, the entity's gross assets per GAAP, the GAAP figures prevail. This was an issue in the Hasso case, where the entity's audited financial statements were prepared using the net equity method of accounting (under which the receipts in question met the 20% of gross assets test), but in footnotes adjusted the gross assets to conform to GAAP (which greatly ballooned the gross assets and caused the receipts to be well below the 20% test). The Hasso court, without any useful discussion, adopted the GAAP footnoted figures as the "obviously correct" figures to apply. While the Hasso court may consider this to be a "no-brainer," it seems helpful for the statute to clearly address this issue.

8. Subdivision (d)(3) carries over the language added as part of the last amendment of section 16350, which was designed to counter the effect of the decision in Estate of Thomas (2004) 124 Cal.App.4th 711. That language applied to trustees who allocated receipts between December 2, 2004 and the operative date of that amendment, which was July 18, 2005, and reflects the 20% gross assets test that then applied.

9. Subdivision (f) is new. Under either the old statute or the new statute, money cannot be considered as received in partial liquidation to the extent it does not exceed the income tax payable by the trustee or the income beneficiary on the entity's taxable income. Thus, for example, even if a receipt is made in partial liquidation of an S corporation, the trustee must characterize as income, and distribute to the income beneficiary, the amount of income tax that the income beneficiary must pay on that receipt. But what happens if the income beneficiary refuses, on privacy grounds, to disclose his or her income tax returns (or other necessary information) to the trustee and thereby prevents the trustee from precisely calculating the income tax attributable to the receipt? The current statute gives no guidance. The new language is intended to allow the trustee, in such situations, to estimate the beneficiary's income tax liability based on reasonable assumptions of the relevant factors (such as the beneficiary's effective tax bracket and available deductions and credits).